1994

Pace v. Cummins Engine Company : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS

OF THE STATE OF UTAH

WILLIAM PACE, Plaintiff and Appellant, vs. CUMMINS ENGINE COMPANY, INC., an Indiana corporation; CUMMINS INTERMOUNTAIN, INC., fka CUMMINS INTERMOUNTAIN DIESEL SALES CO.; SAVAGE FABRICATION CORP., fka SAVAGE RITE-WAY, INC.; SAVAGE MANUFACTURING CORP.; LOWDERMILK ROCK PRODUCTS; and STEVE'S DIESEL SERVICE & SALES, Defendants and Appellees.	: : : : : : : : : :	Case No. 940343-CA Oral Argument Priority 15

BRIEF OF APPELLANT

APPEAL FROM THE RULING OF THE THIRD DISTRICT COURT,
SALT LAKE COUNTY, THE HONORABLE FRANK G. NOEL, PRESIDING

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Plaintiff and Appellant,	:	
vs.	:	
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No addendum required

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JURISDICTION

This Court has jurisdiction over this appeal pursuant to Utah Code Annot. §§ 78-2-2(4) and 78-2a-3(2)(k).

STATEMENT OF THE ISSUES

1. Did the Affidavit of Richard Lee submitted by defendant-appellee Lowdermilk Rock Products contain legal conclusions and inadmissible factual averments upon which the trial court erroneously relied in entering summary judgment, and was it error for the trial court to deny the motion of plaintiff-appellant Pace to strike said affidavit?

2. Did material issues of factual dispute exist which would preclude the trial court from determining as a matter of law that Lowdermilk Rock Products was either liable to Pace for payment of workers' compensation benefits or that such benefits were actually paid to Pace?

STANDARD OF REVIEW

1. Evidentiary rulings are reviewed for abuse of discretion. State v. McClain, 706 P.2d 603, 604 (Utah 1985).

2. On summary judgment, all facts must be viewed in the light most favorable to the nonmoving party. Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991). The appellate court is free to reassess the trial court's legal conclusions. Id.

PERTINENT STATUTORY AUTHORITY

Utah Code Annot. § 35-1-42(3)(b) (1987):

> Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and this work is a part or process in the trade or business of the employer, the contractor, all persons employed by him, all subcontractors under him, and all persons employed by any of these subcontractors, are considered employees of the original employer.

Utah Code Annot. § 35-1-62 (1987):

> When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of said employer, the injured employee or his heirs or personal representative may also have an action for damages against such third person. . . .
>
> For the purposes of this section and notwithstanding the provisions of section 35-1-42, the injured employee . . . may also maintain an action for damages against subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death.

Utah Rule of Civil Procedure 56(e):

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Utah Rule of Evidence 602:

> A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings Below.

This is a negligence action brought by Pace against Lowdermilk Rock Products ("LRP") and a variety of other defendants. All of the defendants except LRP have now been or will be dismissed with prejudice based on settlement agreements between the parties. Claims against LRP have been reserved. After Pace brought his action, LRP filed a motion for summary judgment based on its theory that it was immune from tort liability under Utah's workers' compensation statute. In response, Pace moved to strike an affidavit LRP had filed in support of its motion and opposed the motion on the basis that there were material factual disputes. The district court denied the motion to strike and granted the motion for summary judgment. Pace timely filed a motion for a new trial, which the district court denied on December 16, 1993. The Judgment and Order of Dismissal was signed January 18, 1994, and Pace timely filed his notice of appeal on February 10, 1994.

B. Facts.[1]

Pace was employed as a heavy duty mechanic by Elbert Lowdermilk, Inc. ("ELI"). R. 1458-59. LRP and ELI are separate and distinct corporations and neither is a subsidiary of the

[1] As required by the standard of review for summary judgment, the facts are to be viewed in the light most favorable to the nonmoving party.

other. R. 822-23. However, there was some commonality of ownership and directorship of the two companies. R. 740-41, 822-25. On the date of his injury, plaintiff was dispatched by ELI to provide assistance to the defendant LRP. R. 809-10.

At the time of the accident, Pace was a mechanic working on a transmission for a Rite-Way cement mixer truck owned by LRP. R. 216-17; 809-11. Pace denied he had to follow LRP instructions and stated he worked as a team with the LRP mechanic. R. 811. In order to work on the transmission, the engine had been lifted from the truck and was suspended by a cable arrangement attached to liftout brackets on the engine. R. 217. One of the liftout brackets was of the proper size and type, but one of the liftout brackets was undersized and not of the type specified for the engine. The undersized liftout bracket failed, causing the engine to drop on Pace, injuring him. R. 217.

Pace's salary for the work in question was paid by ELI, and there is no record of LRP ever making any payments to ELI concerning Pace's services. R. 796, 837. Despite requests from Pace, R. 830, no independent evidence of payment was ever produced, and the only evidence of any payments between the two companies is a check record of payment made to LRP from ELI as reimbursement for cement products, consulting services, equipment rental and payroll due LRP. R. 793, 796, 837. The injury was reported to the workers' compensation carrier for ELI, which paid the workers' compensation benefits to Pace. R. 791.

SUMMARY OF ARGUMENT

1. Rule 56(e) states that affidavits may only contain facts which are admissible as evidence. An affidavit submitted by LRP in support of its motion contained paragraphs that stated legal conclusions and that lacked foundation. These paragraphs should have been stricken by the district court, but were not.

2. Recent Utah case law, issued after this appeal was perfected,[2] indicates that in a fact situation such as this one (where an employee (Pace) is loaned to a so-called "special employer" (LRP)), a two-step analysis should be used. First, the court should consider whether the special employer is liable for workers' compensation benefits. To determine this, three criteria are dispositive: (1) does the special employer control the borrowed employee; (2) was there a contract of employment between the special employer and the borrowed employee; and (3) was the work being done essentially that of the special employer. LRP did not control Pace, there was no contract between LRP and Pace, and Pace's work benefitted both LRP Pace's "general employer", ELI. Because Pace's relationship with LRP satisfies none of these criteria, and LRP is not liable for workers' compensation benefits (but is liable in tort).

Second, even supposing that LRP is liable for workers' compensation benefits, it must have paid benefits (or workers' compensation insurance premiums) to be immune from tort suit. LRP has not produced evidence that it paid Pace's workers' compensation insurance premiums, and thus remains liable in tort. Furthermore, factual issues surround each of the criteria listed above (control, contract, nature of work, and payment of premiums). The same recent case law articulating these criteria has also held that they are inherently factual and generally cannot be resolved on summary judgment.

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[2] Ghersi v. Salazar, 883 P.2d 1352 (Utah 1994).

ARGUMENT

I. The Lee Affidavit Should Have Been Stricken.

In support of its Motion for Summary Judgment, LRP submitted to the district court an affidavit prepared by Richard N. Lee. The affidavit does not state Lee's occupation or relationship with LRP. Nevertheless, Lee avers in paragraphs 7, 8 and 9 as follows:

> 7. During the time William Pace was working on the Rite-Way mixer truck he was under the exclusive supervision and control of LRP as his immediate employer.
>
> 8. LRP and William Pace occupied an employee/employer relationship at the time of William Pace's injury.
>
> 9. Elbert Lowdermilk, Inc. initially provided worker's [sic] compensation premium payments on behalf of William Pace. However, it was understood that LRP would reimburse Elbert Lowdermilk Inc. for the appropriate workers' compensation premiums, and LRP did in fact pay such amounts.

R. 741-42.

Rule 56(e), U.R.C.P., states that affidavits in support of a motion for summary judgment "shall set forth such facts as would be admissible in evidence . . . ." These paragraphs are inadmissible. The first two are clearly legal conclusions. "Supervision" and "control", which are discussed later in the brief, are loaded terms in this context, and one cannot conclude they exist without substantial factual and legal analysis. Mr. Lee presumes to advocate a legal position in asserting their existence, rather than state facts. The same is true for paragraph 8: the existence of the "employee/employer" relationship blithely averred is the ultimate issue in this lawsuit. It cannot be averred by Mr. Lee in an affidavit.

As for paragraph 9, there is no foundation for this statement. Mr. Lee in paragraph 2 of the affidavit states that he has personal knowledge of the facts he avers, but this is insufficient foundation to establish Mr. Lee's competency to testify as to the relationship between LRP and ELI and their relationship with Pace. Averring personal knowledge is not equivalent to establishing a foundation for the specific facts alleged in paragraph 9. See U.R.E. 602; Treloggan v. Treloggan, 699 P.2d 747 (Utah 1985). Furthermore, paragraph 9 violates the best evidence rule inasmuch as LRP's payment records (which were requested in discovery but never produced. R. 793) would be the best evidence of payment. If there were no such records, then it would be fundamental to the foundation of Lee's averment that he state as much.

These paragraphs were crucial to LRP's motion for summary judgment. Without them LRP could not show that it was Pace's employer, or that it had paid Pace's workers' compensation premiums (albeit retroactively). Indeed, absent the offending paragraphs, the evidence shows that no money ever passed from LRP to ELI. Rather, the reverse was true: the records show only payments from ELI to LRP. Without these paragraphs, the motion would have failed. They should have been stricken, and the motion denied.

II. Lowdermilk Rock Products Is Not Entitled to the Protection of Workers' Compensation Immunity.

LRP argued below that it is immune from Pace's lawsuit because Pace's exclusive remedy was to procure compensation under Utah's workers' compensation scheme. It contended that it was liable for workers' compensation benefits and satisfied that liability by paying workers' compensation insurance premiums. The record does not support these contentions.

The workers' compensation statute applicable to this case[3] contained two dispositive provisions, sections 35-1-42 and 35-1-62. Section 35-1-42(3)(b) provided

> Where any employer procures any work to be done wholly or in part for him by a contractor over whose work he retains supervision or control, and this work is a part or process in the trade or business of the employer, the contractor, all persons employed by him, all subcontractors under him, and all persons employed by any of these subcontractors, are considered employees of the original employer.

Utah Code Annot. § 35-1-42(3)(b) (1987).

Section 35-1-62 provided

> When any injury or death for which compensation is payable under this title shall have been caused by the wrongful act or neglect of a person other than an employer, officer, agent, or employee of said employer, the injured employee or his heirs or personal representative may also have an action for damages against such third person. . . .
>
> For the purposes of this section and notwithstanding the provisions of section 35-1-42, the injured employee . . . may also maintain an action for damages against subcontractors, general contractors, independent contractors, property owners or their lessees or assigns, not occupying an employee-employer relationship with the injured or deceased employee at the time of his injury or death.

Utah Code Annot. § 35-1-62 (1987).

In Pate v. Marathon Steel, 777 P.2d 428 (Utah 1989), the Supreme Court, after construing the predecessors of these sections, held that "statutory employers" who were not immediate employers could enjoy immunity under the statute only if (1) they were liable for workers' compensation benefits under the statute, and (2) they actually paid the benefits. In the district court Pace argued that LRP was a statutory employer, as that term was defined in Pate,

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[3] The applicable statutory sections are those that were in effect in 1987, the year of the accident.

and that LRP had failed to actually pay workers' compensation benefits, as Pate required. Since the district court's decision, the Supreme Court has stated that the "relationships between . . . a 'loaned' or temporary employee are different from statutory employer-employee relationships and different legal principles govern that relationship." Ghersi v. Salazar, 883 P.2d 1352, 1356 (Utah 1994). The Ghersi court's adoption of a loaned-employee analysis requires Pace to reanalyze the facts in the context of that decision.

Under Ghersi, LRP is a "special employer"--that is, an employer that "borrows" an employee (here, Pace) from a "general employer" (here, ELI).[4] But simply because LRP is a "special employer" does not automatically allow it to enjoy immunity under the statute. Like the Pate court, the Ghersi court held that two facts must be established in order for a special employer to be immune under the statute: (1) the special employer must be liable for workers' compensation benefits; and (2) the special employer must have actually paid the benefits.

A. LRP Has No Liability For Benefits as a Special Employer

Pate held that liability is established if an employer is deemed a "statutory employer." This designation requires statutory analysis. In contrast, Ghersi has articulated a different test to determine whether a special employer is liable for workers compensation benefits. The following criteria are dispositive:

> (1) The employee must have made a contract of hire, express or implied, with the special employer;

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[4] These labels--borrowed employee, special employer, and general employer--are not imbued with special legal significance. They are labels of convenience devised by Professors Larson in their treatise, and used in turn by those courts relying on the treatise, including the Ghersi court. See 1B Arthur Larson & Lex Larson, Larson's Workmens' Compensation Law, ¶ 48.13 (1994); see also Ghersi, 883 P.2d at 1356. Simply because one is labelled a "special employer" does not mean that one is an employer that enjoys immunity under the statute.

(2) the work being done must be essentially that of the special employer; and

(3) the special employer must have the right to control the details of the work.

Ghersi, 883 P.2d at 1356-57. Each of these criteria must be met.

As a threshold matter, determining whether these criteria are satisfied is not possible on summary judgment; rather, it is a question of fact for the jury. Novenson v. Spokane Culvert & Fabricating Co., 588 P.2d 1174, 1177 (Wash. 1979), cited in Ghersi, 883 P.2d at 1357. See Sims v. General Telephone & Electronics, 815 P.2d 151, 159 & n.6 (Nev. 1991)("'in the absence of a clearly established [workers' compensation statute] defense, summary judgment must be denied.'").

i. There Was No Contract Of Hire Between LRP and Pace

As to criterion (1), the court in Ghersi made it clear that a contract was crucial "because application of the loaned employee doctrine results in an employee's relinquishing the right to sue his special employer for common law negligence." Ghersi, 883 P.2d at 1357. Because Ghersi was an employee of a temporary labor service, the court found that he made an implied binding contractual acceptance when he chose to accept work offered by the service. Id.

Here no such contract may be implied. Pace was not "offered" an opportunity to work for LRP that he could "accept". He was *instructed* by an ELI supervisor to assist an LRP employee. R. 790, 809-10. Pace had no choice in the matter: he was simply following instructions. Unlike the temporary service employer in Ghersi, ELI did not hire out its mechanics. Pace did not have "the right to accept or refuse [ELI]'s assignments." Ghersi, 883 P.2d at 1357. Pace did not submit to LRP's supervision and control. Id. Pace worked *with* an LRP employee, not *under* him. R. 809-11.

Cases analogous to this one show that no contract existed between LRP and Pace. Courts in other jurisdictions have held uniformly that when an employee is simply following the instructions of his superior to work on the premises of a special employer or among the special employer's employees, and did not affirmatively request the transient assignment, the employee did not contract with the special employer. DePaola v. Cummins Diesel Engines, 164 A.2d 301 (Conn. 1960)(employee ordered to assist employees of engine company; third-party action permitted); Bourette v. Dresser Industries, 481 A.2d 170 (Maine 1984)(employees assigned to work at plant under plant employee's direction; plant did not have authority to fire employees, and salary was paid by general employer, and thus plant was liable in tort); Clark v. Luther McGill, Inc., 127 So.2d 858, 862 (Miss. 1961)(immediate control not to be confused with ultimate control; "he is master who has the supreme choice, control and direction of the servant and whose will the servant represents in the ultimate result and all its details . . . ."); Eagle v. City of St. James, 669 S.W.2d 36 (Mo. Ct. App. 1984)(city police officer directed to assist highway patrolman; police officer's obedience to a superior did not demonstrate consent to become a loaned employee); Bonnani v. Weston Hauling, 140 A.2d 591 (Penn. 1958)(trucking contractor under contract to move shovel instructed employee of shovel operator to move shovel; employee free to sue contractor); Shell Oil Co. v. Reinhart, 375 S.W.2d 717 (Texas 1964)(employee of independent contractor well cleaner injured while helping well company employee permitted to sue in tort); Fisher v. City of Seattle, 384 P.2d 852 (Wash. 1963)(employee of subsidiary not employee of parent because employee did not know of agency contract between parent and subsidiary; employee lacked consent); Pichler v. Pacific Mechanical Constructors, 462 P.2d 960 (Wash. 1969)(employee of a company whose trucks and drivers

were leased by defendant was not defendant's employee; employer retained right to hire and fire employee).

These cases also point out that even where the special employer directs the employee's actions, this does not mean that there was a contract between the employee and the special employer. Thus, even ignoring the factual disputes surrounding this issue and accepting LRP's contention that an LRP employee supervised and/or controlled Pace, the fact that he never wittingly accepted LRP as his employer indicates that there was no contract.

> [An employee's] consent [to the new employment relation] may be implied from the employee's acceptance of the special employer's control and direction. But what seems on the surface to be such acceptance may actually be only a continued obedience of the general employer's commands. For example, when a general employer told claimant to help the employer's friends get a motorboat started, claimant's temporary compliance with the friends directions was held to be nothing but *the carrying-out of the general employer's general instructions*.

1B Arthur Larson & Lex Larson, Larson's Workmens' Compensation Law, ¶ 48.15, at 8-464 to 8-470 (1994)(emphasis supplied)(hereinafter "Larson").

ii. The Work Was Not Essentially That of LRP

As to criterion (2),

> If it possible to say, in a particular case, that the job being accomplished was of interest only to the special employer, the chances are good that the lent-employee doctrine will be applied. For example, when a dealer borrowed an employee from a car distributor to get a car delivered in which the distributor had no interest whatever, the dealer became the employer.

Larson ¶ 48.21, at 8-485. This example speaks for itself. LRP must establish that changing the transmission inured exclusively to the benefit of LRP, and imparted no benefit to

ELI. Mutual benefit is insufficient to satisfy criterion (2). Mathurin v. City of Putman, 71 A.2d 599 (Conn. 1950); see generally Larson ¶ 48.22.

LRP cannot meet its burden. ELI and LRP shared officers and ownership, and in this respect their dealings were interrelated. Indeed, their relationship could be characterized as nothing less than a symbiosis. R. 792 (the two companies regularly shared employees). This is best evidenced by the fact that ELI paid Pace his wages even while Pace worked at LRP, and that at least once ELI reimbursed LRP for use of LRP employees. R. 793. Obviously the opportunity to lend employees inured mutual benefit to the two companies. Also, an ELI supervisor instructed Pace to report to LRP, indicating that ELI desired that Pace assist LRP. It would be unreasonable to infer from this that ELI was being entirely altruistic.

iii. LRP Did Not Control Pace

Criterion (3) has already been addressed rather thoroughly in the discussion above of whether Pace had entered into an employment contract with LRP, and the cases cited there also apply to the issue of control. LRP averred below that Pace was under the control of LRP, a fact Pace has denied. R. 791. This factual dispute in itself is sufficient to reverse a summary judgment. Even so, the "control" claimed by LRP is not the control required by criterion (3). Lee stated in his affidavit that Pace was "under the exclusive supervision and control" of LRP. R. 741. Pace was a mechanic, and his services were rendered to LRP to repair the transmission of the Rite-Way mixer. From this alone it is clear that LRP could not have exercised much control over Pace, given that his expertise in transmission repair was apparently lacked by anyone at LRP. In any event, given the paucity of facts forwarded by LRP, it is difficult to ascertain precisely what supervision and control LRP exercised over Pace, but what is essential is that LRP demonstrate that it had the right to control the time and place of the services, the

person for whom rendered, and the degree and amount of services. Larson ¶ 48.30, at 8-545; see Clark v. Luther McGill, Inc., 127 So.2d 858, 862 (Miss. 1961)(immediate control not to be confused with ultimate control; "he is master who has the supreme choice, control and direction of the servant and whose will the servant represents in the ultimate result and all its details . . . ."); Sims v. General Telephone & Electronics, 815 P.2d 151, 159 (Nev. 1991)("Whether . . . 'control' exist[s] . . . is determined by the totality of the circumstances, including: (1) the degree of supervision; (2) the existence of a right to hire and fire; (3) the right to control the worker's hours and location of employment; (4) the source of wages; (5) the extent to which the worker's activities further the alleged employer's business concerns."). Given these factors, Pace was in reality "controlled" by ELI. ELI told Pace where to go and when to go there. ELI told Pace to whom he should report. ELI was the source of Pace's wages, and, absent any evidence in the record that Pace was anything but an at-will employee, ELI ostensibly retained the right to dismiss Pace. Finally, ELI defined the scope of Pace's assistance by explaining what repairs were needed.[5]

B. LRP Did Not Pay Pace's Workers' Compensation Benefits.

Even if LRP could demonstrate that there are no factual disputes as to whether it satisfied the three threshold criteria, the question would remain as to whether LRP paid workers' compensation premiums for Pace's benefit. Echoing Pate, Ghersi expressly requires payment of benefits for immunity to apply. "Because all three elements of the loaned employee doctrine are satisfied, we conclude that Huish was Ghersi's special employer for purposes of workers'

[5] Once again, these conclusions stem from Pace's version of the facts. If LRP contends that other facts control, then a dispute exists, and summary judgment should have been denied.

compensation. Therefore, whether Huish is immune from suit under section 35-1-60 depends on whether Huish paid for Ghersi's workers' compensation benefits." Ghersi, 883 P.2d at 1357.

The court in Ghersi found for the special employer because it paid an hourly fee to the general employer (a provider of temporary laborers), and thus the general employer acted as the special employer's agent in paying workers' compensation benefits. Such is not the case between LRP and ELI. There was no agency contract or fee paid by LRP to ELI for Pace's services. There is thus no way to attribute as insurance payments moneys flowing from LRP to ELI. Recognizing this problem, LRP asserted below that it contributed money to Pace's workers' compensation coverage pro rata, in accord with the amount Pace worked for LRP.

LRP's contention is suspiciously self-serving and entirely unsupported by the record. The only evidence in the record that LRP indeed paid Pace's workers' compensation premiums is the Lee affidavit. In it, Lee asserts that "it was understood that Lowdermilk Rock Products would reimburse Elbert Lowdermilk, Inc. for the appropriate workers' compensation premiums, and Lowdermilk Rock Products did indeed pay said amounts." R. 742. Despite requests from Pace, R. 830, no documentary evidence of payment was ever produced, and the only evidence produced of any payments between the two companies is a check record of payment made to LRP from ELI as reimbursement for wages paid to LRP employees that had helped ELI. R. 793, 796, 837.

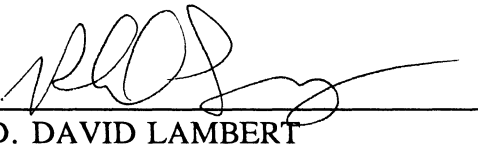
The Lee affidavit, even if admissible, is clearly insufficient to demonstrate that LRP provided Pace with workers' compensation benefits. A post hoc "reimbursement", record of which does not even exist, is as incredible as it is inadequate. Such a practice cannot be taken as evidence of insurance coverage in any context: if it were, everyone against whom a claim was asserted would then feel free to "reimburse" the party responsible for obtaining coverage after

loss occurred in order to bootstrap themselves into immunity. Such was not the practice in Ghersi, where the special employer paid its fixed fee to the general employer on an hourly basis and pursuant to a contract that *specified* that a portion of the fee would be allocated to an allowance for worker's compensation. Ghersi, 883 P.2d at 1354, 1357-58. The agreement between the two employers in Ghersi contained an understanding that the general employer would pay workers' compensation premiums. Id. at 1358. Furthermore, as noted above, LRP cannot claim the special relationship enjoyed by the temporary labor service in Ghersi because payment of premiums is contemplated by the agency nature of temporary labor service contracts.

CONCLUSION

LRP's motion for summary judgment was improperly granted. It was supported by a defective affidavit, and even if that affidavit was valid, Pace raised a number of material factual disputes surrounding Pace's status as an employee of LRP. Furthermore, resolving those factual disputes in LRP's favor is unavailing to LRP: the applicable law defining Pace's relationship with LRP indicates that LRP is liable in tort to Pace. Pace never contracted with LRP and was never under LRP's control, as he was simply following ELI's instructions to help LRP with transmission repair. The district court should be reversed.

DATED this 27th day of January, 1995.



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MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 27th day of January, 1995.

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